McDonnell Douglas Corporation; McDonnell Douglas Electronic Systems Company, a Division of McDonnell Douglas Corporation; and McDonnell Douglas Aerospace Information Services Company, a Division of McDonnell Douglas Corporation, Single and/or Joint Employers *and* Southern California Professional Engineering Association and McDonnell Douglas Tulsa, a Division of McDonnell Douglas Corporation; McDonnell Douglas Space Systems Company, a Division of McDonnell Douglas Corporation; and Douglas Aircraft Company, a Division of McDonnell Douglas Corporation, Parties to the Contract. Case 21–CA–27479

February 28, 1994

ORDER DENYING MOTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On September 24, 1993, the National Labor Relations Board issued a Decision and Order[1] in which the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without the Union's agreement (1) removing bargaining unit employees from the unit on their change of assignment from one to another of the Respondent's component companies and, approximately 3 months later, (2) returning these employees to the unit for approximately 5 days, and then removing them again from the unit.

On November 29, 1993, the Respondent filed a motion for reconsideration of the Decision and Order, pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations. No opposition to the motion was filed.

The Respondent contends that the decision in this case is inconsistent with the Board's decisions in *Antelope Valley Press*,[2] *Armco Steel Co.*,[3] and *Rock Bottom Stores*.[4]

The Board, having duly considered the matter, finds that the cases relied on by the Respondent are inapposite, and that they do not warrant reconsideration of the Board's Decision and Order.

In *Antelope Valley*, supra, the bargaining unit in the collective-bargaining agreement was described in terms of work assignments, rather than job classifications. During negotiations for a renewal contract, the employer proposed—and the union opposed—a contractual provision that would permit the employer unilaterally to assign certain specified kinds of unit work to persons outside of the contractual bargaining unit. The employer and the union bargained to impasse over this proposal. The employer thereafter unilaterally implemented it, and subsequently assigned certain unit work to be performed by persons outside the unit.

The issue before the Board in *Antelope Valley*, supra, was whether the employer's proposal was essentially for the reassignment of unit work outside of the unit (a mandatory subject of bargaining, about which the employer could lawfully bargain to impasse and then unilaterally implement) or essentially for a change in the scope of the bargaining unit (a permissive subject of bargaining, about which the employer could not lawfully bargain to impasse and then unilaterally implement).

The Board noted that resolution of this issue is particularly difficult in cases such as *Antelope Valley* where the bargaining unit is defined in terms of work performed because any proposal relating to work assignments affects the scope of the bargaining unit. Consequently, as the Board explained in the case consolidated with *Antelope Valley* for oral argument, the Board ''formulated a new test for determining under what circumstances, if at all, a party may lawfully insist to impasse on changes in work assignments when the previously agreed-upon bargaining unit description is based on descriptions of work performed.'' *Bremerton Sun Publishing Co.*, 311 NLRB 467, 468 (1993). The new test is as follows:

> The Board [in *Antelope Valley*] held that when unit descriptions are couched in those terms, an employer may, after reaching impasse, insist on transferring work of a type contained within the description to employees other than those currently performing it. The employer may not, however, either change the unit description itself or insist that nonunit employees to whom the work is transferred will remain outside the unit. [Id.]

First, unlike in *Antelope Valley*, the contractual bargaining unit in the instant case is described in terms of job classifications, rather than work assignments.[5] Thus, the Board in the instant case was not confronted at the outset with the difficult legal question it faced in *Antelope Valley*.

Second, unlike the employer in *Antelope Valley*, the Respondent here did not propose in advance to take the action in question. Rather, as fully discussed in the Board's decision, it simply and unilaterally took the action.

Third, but perhaps most important, and unlike in *Antelope Valley*, the unilateral action in question in the instant case is not the *reassignment of work* from the unit, but instead the *removal of employees* from the unit.[6] As fully discussed in the Board's decision, the

[1] 312 NLRB 373.
[2] 311 NLRB 459 (1993).
[3] 312 NLRB 257 (1993).
[4] 312 NLRB 400 (1993).

[5] Thus, for example, the unit descriptions of the employees in question in this case are computing analysts, computing engineers, computing specialists, and senior computing specialists.

[6] Indeed, in arguing that its unilateral reassignment of unit work out of the unit in *Antelope Valley* was lawful, the employer in that

Respondent's unilateral removal of unit employees from the unit necessarily affected the rights of those employees to be represented by the Union.[7] Unlike the right of the employer in *Antelope Valley* to reassign unit work out of the unit, the rights of the employees in the instant case to be represented by the Union are fundamental statutory rights which are beyond the legitimate scope of unilateral action on the part of the Respondent.[8]

The Respondent's reliance on *Armco*, supra, and *Rock Bottom*, supra, in support of its motion is also unavailing. The issues in both of those cases involved the unit placement of employees following their *physical relocation* to a new work location. As fully discussed in the Board's decision in the instant case, the Respondent's removal of the employees from the bargaining unit was not accompanied by any physical relocation of them to a new workplace. Rather, unlike in *Armco* and *Rock Bottom*, the employees here were simply administratively reassigned from one to another of the Respondent's component companies, without any change in the nature or location of their work, and indeed without any interruption of it.

For the above reasons, the Respondent's motion for reconsideration is denied.

ORDER

The Respondent's motion for reconsideration is denied.

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case emphasized, inter alia, that the implementation of its proposal did not take any employee out of the unit. 311 NLRB 559. Similarly, the Board stressed that, under its new approach, an employer ''will not be able to decide, unilaterally, questions regarding the scope of the unit.'' Id.

[7] 312 NLRB 373.

[8] For essentially the same reason, the Respondent's reliance also on *Transport Service Co.*, 282 NLRB 111 (1986), and *NCR Corp.*, 271 NLRB 1212 (1984), in support of its instant motion is equally unavailing. As noted in the Board's decision, those cases (like *Antelope Valley*) involve the reassignment of unit work—not the removal of unit employees—from the unit.